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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Susan Illston, Judge

IN RE HP INC. SECURITIES)
LITIGATION.) NO. C 20-01260 SI
)
_____)

San Francisco, California
Thursday, September 9, 2021

TRANSCRIPT OF REMOTE ZOOM VIDEO CONFERENCE PROCEEDINGS

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Thursday - September 9, 2021

10:53 a.m.

P R O C E E D I N G S

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THE CLERK: Now calling Case Number 20-cv-1260, In Re HP Inc. Litigation.

Counsel, can you please state your appearances for the record, starting with plaintiff.

MR. RIZIO-HAMILTON: Good morning. John Rizio-Hamilton, Bernstein Litowitz Berger & Grossmann, for the lead plaintiffs.

THE COURT: Good morning.

MS. JOOST: Good morning. Jennifer Joost, Kessler Topaz Meltzer & Check, for the plaintiffs.

THE COURT: Good morning.

MR. LUTZ: Good morning, Your Honor. Brian Lutz from Gibson Dunn on behalf of the defendants.

THE COURT: Good morning.

MS. PERCOPO: Good morning, Your Honor. Lissa Percopo, also from Gibson Dunn, on behalf of the defendants.

THE COURT: Good morning.

MR. DOLAN: Good morning, Your Honor.

MR. SCHATZ: Good morning --

MR. DOLAN: Good morning, Your Honor. Matt Dolan, from Sidley Austin, on behalf of the defendants.

THE COURT: Good morning.

MR. SCHATZ: I think it's my turn now.

1 **THE COURT:** I think so.

2 **MR. SCHATZ:** Good morning, Your Honor. I'm Steven Schatz,
3 Wilson Sonsini, on behalf of Catherine Lesjak.

4 **THE COURT:** Good morning.

5 **MS. HENDERSON:** Good morning, Your Honor. Katherine
6 Henderson, also Wilson Sonsini Goodrich & Rosati, on behalf of
7 Catherine Lesjak.

8 **THE COURT:** Good morning. So is that everybody? I think
9 it is.

10 Okay. This is a hearing on defendants' motion to dismiss
11 plaintiffs' amended complaint.

12 The amended complaint is a lot longer than the original
13 complaint, which was itself I thought quite long. So we have a
14 lot to work with. And I guess I have a few questions that
15 maybe I'll just toss out and folks can respond.

16 First, with respect to the Four Box Model statements,
17 which are still in there -- there's a lot of other stuff in
18 there now too -- but the original from the first complaint
19 Four Box Model alleged misrepresentations are still there.

20 And I guess my question to the defendants is whether
21 statements which omit to state that there was a lack of
22 telemetry data for toner printers is material. So perhaps the
23 defendants could start with that.

24 **MR. LUTZ:** Sure, Your Honor. There is Brian Lutz. I'll
25 start.

1 Look, the Four Box Model statements or this Four Box Model
2 theory is, I would say, still in the complaint, obviously, as
3 you note. It is not the lead theory anymore by my read of the
4 complaint and is de-emphasized in the complaint in lieu of the
5 new and broader theory of the Pull Model didn't exist.

6 With respect to the Four Box Model theory itself, I think
7 it's almost verbatim the same as it was the last time around.
8 There are some around-the-edges changes, which I can get to;
9 but fundamentally, it's the same theory as before based on the
10 same allegations as before and should be dismissed for the same
11 reason that Your Honor dismissed it the last time around, which
12 is to say, there are no specific factual allegations
13 demonstrating that the statements regarding the contents or
14 reliability of the Four Box Model were materially false or
15 misleading, and there's no allegations demonstrating that any
16 defendant knew or was deliberately reckless in making
17 statements -- deliberately reckless in not knowing about the
18 lack of statistically significant sampling of telemetry data
19 and that that would then make the Four Box Model unreliable.
20 Those facts just don't -- they didn't exist the last time
21 around, and they don't exist this time around as well.

22 And really, the newest allegations -- really, the only new
23 allegations, I think, in the complaint as respects to the
24 Four Box Model are the charts that the plaintiffs have provided
25 which purport to show how, you know, differences in

1 statistically significant data might have impacted the
2 reliability of the Four Box Model.

3 As we set forth in our briefing, Your Honor, those are
4 made-up data. Right? Those are not actual data contained
5 anywhere other than from the lead plaintiffs themselves, as
6 they acknowledge, you know, candidly in their complaint. Those
7 are not -- those were not factual allegations about anything.
8 Those are just made-up data.

9 So to answer your question, I don't think there's anything
10 materially different about the Four Box Model theory of fraud
11 in the amended complaint that would distinguish it from the
12 allegations in the prior complaint. And that theory, which is,
13 again, heavily de-emphasized in the amended complaint, should
14 be dismissed for the same reason as Your Honor dismissed it the
15 first time around.

16 **THE COURT:** Perhaps I asked the wrong question, but I was
17 concerned about whether or not you believe it's material, the
18 fact that telemetry data was not available from many of
19 these -- what is it? The toner printers, I think, from
20 Europe -- whether that's material. Is that material
21 information that should have been disclosed?

22 **MR. LUTZ:** Given that HP disclosed during the course of
23 the relevant period that the Four Box Model relied on all sorts
24 of types of data, including telemetry data, I don't think that
25 specific piece of it is a material omission, that we didn't

1 disclose, you know, specific information about a specific part
2 of the telemetry data from a particular geographic region.

3 I would note, Your Honor, that information is not alleged
4 to have been known -- right? -- before February of 2019.
5 There's no factual allegation that anybody knew before February
6 that there was a gap in the telemetry data, and that that gap
7 indicated that there was a lack of statistically significant
8 telemetry data for that one particular region, and that as a
9 result of that, that the Four Box Model included flawed
10 assumptions regarding market share; ultimately overestimated
11 demand in one particular area.

12 But to directly answer your question, that specific piece
13 I don't think is material in light of all of the allegations
14 and the admissions and HP statements that there was more that
15 went into the Four Box Model than just one sliver of data or
16 one piece of the data. It wasn't just telemetry data. It was
17 all kinds of other things as well.

18 **THE COURT:** Okay. Thank you.

19 Who's going to speak for the plaintiffs today?

20 **MR. RIZIO-HAMILTON:** I will, Your Honor. This is John
21 Rizio-Hamilton.

22 **THE COURT:** Okay. What do you say about the materiality
23 of the failure to disclose lack of telemetry data from Europe
24 on the printers?

25 **MR. RIZIO-HAMILTON:** The complaint alleges facts that

1 adequately support an inference of materiality for this
2 omission for several reasons.

3 First, as noted in paragraph 180 of the complaint, the
4 toner side of the business was actually the bigger side of the
5 business. It was the commercial side. And that's where HP
6 generated the majority of its supply revenue. So that's
7 point one.

8 Point two is that the defendants themselves in February of
9 2019, in connection with a first corrective disclosure in the
10 complaint, attributed the very large miss in earnings to this
11 lack of telemetry data. In particular, they stated that
12 revenue was down 3 percent for the quarter year over year, and
13 would be down 3 percent for all of 2019. And the reason they
14 said this had occurred is because the telemetry data that they
15 had was wrong. So that's point two. You could see the impact
16 of this very clearly in the February 2019 disclosure, and that
17 impact was material.

18 Point three, I have to respectfully disagree with my
19 colleague that there's nothing new to see here. There is
20 important new factual information in the amended complaint that
21 demonstrates just how severe the lack of data was and further
22 supports an inference of materiality for the omission.

23 In particular, Former Employee 9, who's a new former
24 employee added to the complaint since the last time Your Honor
25 took a look at this, told us that the company closely tracked

1 the level of telemetry data it was receiving in a dashboard
2 that it kept centrally. Former Employee 9 reported that in the
3 2017 and 2018 time frame, this dashboard showed that the
4 telemetry data for market share, which was a critical input
5 into the Four Box Model, was at only 20 to 30 percent full, and
6 that there was about 70 to 80 percent that was missing, that
7 was not there. Likewise, the telemetry data in that same time
8 frame for the usage box of the Four Box Model, another critical
9 input, was only 40 percent full. That was 60 percent absent.

10 These new detailed factual allegations demonstrate that it
11 wasn't just some little bit of data that was missing. It was
12 the lion's share. And in the case of market share, it was the
13 substantial lion's share. And that further supports an
14 inference of materiality because it shows how big the gap was.

15 And so I think when you look at all of these facts
16 together -- (a) the fact that the data related to the toner
17 side of the business which was the biggest side of the
18 company's business; (b) that the absence of this data, when it
19 came home to roost in February of 2019, had a profound impact
20 on the company's business; and (c) the new factual allegations
21 from Former Employee 9 which show how severe the gap in the
22 data was -- there is ample support for an inference of
23 materiality at the pleading stage.

24 And I would just add two more quick points.

25 One, this is particularly true given that materiality is a

1 fact issue, generally speaking; and at this stage of the game,
2 it's something that's typically not decided on the pleadings,
3 particularly where, as here, we do have support for the
4 inference.

5 And, two, another important aspect of what
6 Former Employee 9 says -- and on this point I also respectfully
7 disagree with my colleague -- is that the company's most senior
8 executives were monitoring this absence of data. And I think
9 that tells you two things. It tells you (a) that it was
10 significant because it caught their attention; and (b) it also
11 supports an inference of scienter with respect to the omission.

12 In particular, former employee stated that former employee
13 briefed his supervisor, the head of supplies, Ms. Marcons in
14 quarterly -- Ms. Barcons -- excuse me -- in quarterly business
15 review meetings repeatedly on the lack of telemetry data as set
16 forth in the dashboard; and the purpose of these meetings was
17 for Ms. Barcons to report to Defendant Lores on this subject.

18 And following these meetings that Ms. Barcons had with
19 Defendant Lores, Former Employee 9 would receive questions from
20 Ms. Barcons from Defendant Lores to the effect of: What are we
21 doing in order to increase the numbers? How long will it take,
22 and can we speed that up?

23 And this is set forth at paragraphs 186 and 187 of the
24 amended complaint.

25 And those facts, Your Honor, as I noted, are -- have

1 import for the materiality analysis because they show that the
2 most senior executives of the company were focused on this
3 issue, and they also have import for the scienter analysis.

4 **MR. LUTZ:** Your Honor, may I respond?

5 **THE COURT:** Yes, mm-hmm.

6 **MR. LUTZ:** Yeah. I mean, look, on the actively
7 monitoring, which I think is the phrase that my colleague used,
8 there is no support for that in the complaint.

9 There's one former employee who has no personal connection
10 to any of the individual defendants who says: I provided
11 information on telemetry data -- because telemetry data was a
12 thing and the company was obviously using it for the
13 Four Box Model. I provided telemetry data to my boss, who then
14 had meetings with one of the individual defendants; and that
15 there is a claim that questions came after that about telemetry
16 data.

17 That is not actively monitoring. And it's also
18 insufficient to show that Mr. Lores or, frankly, any of the
19 other individual defendants knew that anything about the
20 telemetry data indicated that the Four Box Model was unreliable
21 or that the lack of statistical- -- that there was a lack of
22 statistically significant telemetry data for any of the anchor
23 toner lines in any of the geographies, or that that led to, or
24 that there was, any flaws in the Four Box Model as a result.

25 Those facts do not exist in the complaint. They haven't

1 pled scienter. This is a new allegation. This is not an
2 allegation that establishes falsity, and this is not an
3 allegation that comes close to establishing scienter with the
4 specificity required under the PSLRA.

5 **THE COURT:** Okay. Thank you.

6 **MR. LUTZ:** What you would need, Your Honor, is reports --
7 we went over this in the last argument. Right? What you need
8 to plead scienter is specific factual information provided to
9 the defendants or that somebody can say they knew that the
10 statements they were making were false. Right?

11 You need, as to the Four Box Model or this other theory of
12 fraud, specific information:

13 "I was in a meeting where it was discussed that the
14 Four Box Model was unreliable and everybody knew it, or senior
15 officers knew it."

16 "I provided information that demonstrated the
17 unreliability of the Four Box Model; so people knew that the
18 statements about the Four Box Model being reliable were false."

19 That does not exist in the complaint. That is not what
20 Former Employee Number 9 says, by any means.

21 **THE COURT:** I want to ask a different but, I think,
22 related question; and this, I'll ask you, Mr. Rizio-Hamilton,
23 to begin with.

24 There's a chart in your papers, this "Maintaining Supply
25 Stability" chart, "Fiscal Year '19 4-Box Driver Trends." Do

1 you know what I'm talking about?

2 **MR. RIZIO-HAMILTON:** Which paragraph do you have that at,
3 Your Honor?

4 **THE COURT:** I do not know that.

5 **MR. RIZIO-HAMILTON:** Let's see. I'm looking at the
6 charts. We have five charts setting forth an illustration of
7 how a lack of statistically significant data would --

8 **THE COURT:** No, no. This is a chart that was used -- it's
9 like a PowerPoint chart that was used by one of the defendants,
10 Defendant Lores, to show market share increase.

11 **MR. LUTZ:** 409.

12 **MR. RIZIO-HAMILTON:** 409.

13 **MR. LUTZ:** Judge Illston, can you say the name -- the
14 header on the slide again?

15 **THE COURT:** I don't have it here. I just have the --

16 **MR. LUTZ:** Sorry.

17 **THE COURT:** I'm sorry. I just have the chart, the thing
18 itself.

19 There's a lot of pages in this --

20 **MR. LUTZ:** You're telling me.

21 Does it say "Maintaining Supply Stability"?

22 **THE COURT:** Yes.

23 **MR. LUTZ:** Okay. Paragraph 409.

24 **THE COURT:** What I wanted to know is, you've characterized
25 what, I guess, Defendant Lores said, but do you have the text

1 of whatever was said about this chart?

2 **MR. RIZIO-HAMILTON:** So we have -- we have reproduced the
3 chart itself here. And the allegation here is that -- is that
4 the chart reflected an upward arrow for share when, in fact,
5 share was decreasing. So --

6 **THE COURT:** I wanted to know -- I wanted to know if you
7 have any information -- well, if you have the text of what was
8 actually said by the person presenting this chart.

9 **MR. RIZIO-HAMILTON:** So I do not have it at my fingertips.

10 **THE COURT:** It's not in the complaint. I know that.

11 **MR. RIZIO-HAMILTON:** Right.

12 **THE COURT:** But I wondered if you have it.

13 **MR. RIZIO-HAMILTON:** I do not have it presently with me.

14 **THE COURT:** But do you have it? Because I don't know what
15 the complaint claim was based on.

16 **MR. RIZIO-HAMILTON:** Right.

17 **THE COURT:** Is it based on a text you do have?

18 **MR. RIZIO-HAMILTON:** Yes, it is based on a text of,
19 you know, (a) the slide itself; and (b) we do have the
20 underlying materials from this presentation.

21 **THE COURT:** Including what was said?

22 **MR. RIZIO-HAMILTON:** Right. Right. We would have that.

23 But I must confess, I don't have it, you know, with me at
24 the moment.

25 **THE COURT:** All right. Well, because I think the

1 defendants say that this is all puffery, and I just wondered
2 what was said about it, because that would matter.

3 **MR. RIZIO-HAMILTON:** H'm. Well, okay. You know,
4 thank you for that because that's helpful context.

5 So this chart and the others like it in the complaint were
6 presented to investors to demonstrate to them that the
7 company's supplies business had stabilized and then ultimately
8 began to grow again in 2018. And that was of the utmost
9 importance to investors because it accounted for substantially
10 all of the company's revenues and profits; and it had come,
11 these statements, a couple of years after the company had
12 disclosed this pretty devastating \$450 million inventory
13 drawdown that it had to make.

14 And so in order to sort of rehabilitate the company's
15 value in the eyes of the market, the company had to convince
16 investors that the supplies business -- again, substantially
17 all the company's revenue and profit -- was stabilizing and
18 ultimately would return to growth.

19 And this chart was one such statement that defendants made
20 in order to convince investors of that turnaround story.
21 You know, you can see here that they say they're maintaining
22 supply stability, which was critical for the company to
23 demonstrate to the market for HP to have any real value. And
24 the increase in market share was also critical for the company
25 to convince investors of because market share, and particularly

1 increases in market share, was the way the company was going to
2 increase its business and its stock price. A decreasing market
3 share would mean a deteriorating and ultimately dying company.

4 And so these charts and the statements made around them
5 were essential for -- to convince the marketplace of this
6 central supplies narrative of stability and then, ultimately,
7 growth that the company put forward throughout the class period
8 but which ultimately wasn't true. And it wasn't true at the
9 time in significant part because -- you know, not only because
10 of their inability to measure these things, given the lack of
11 statistically significant telemetry data; but also because the
12 company continued to push excess supplies into the sales
13 channel above demand to create an illusion of stability and an
14 illusion of growth in 2017 and 2018 that came crashing down
15 beginning in early 2019.

16 And, you know, that is a new category of allegations in
17 the complaint and I think one that answers an important
18 question that Your Honor posed in Your Honor's dismissal order,
19 which is: Why did the Four Box Model appear at least to be
20 accurate for some amount of time?

21 And the reason is because the company was selling excess
22 inventory into the channel above demand in order to make
23 numbers, and that ultimately crashed down in 2019 when the
24 company admitted that it, yet again, had sold at least
25 \$100 million of excess inventory into the channel and market

1 share was not growing, as reflected in this slide, but was
2 shrinking.

3 **MR. LUTZ:** Your Honor, may I respond?

4 **THE COURT:** You may.

5 **MR. LUTZ:** Yeah. First off, there's absolutely nothing
6 new about this allegation. It's just copied verbatim from the
7 prior complaint. So I disagree with what my colleague just
8 said.

9 Just to go to your question, though, Your Honor, this is
10 not a slide that we claim contains puffery. This was attached
11 as -- rather, it's a forward-looking statement. If you read
12 the -- you can't see it in probably what you have before you,
13 but we attached an actual readable version of this slide --
14 because it wasn't legible in the first complaint or this
15 complaint, but we attached a legible version of it -- so we can
16 all actually look at it and read it -- as Exhibit 16 to my
17 colleague, Ms. Percopo's -- I'm sorry -- 17 to my colleague
18 Ms. Percopo's declaration in our first --

19 **THE COURT:** In the first one?

20 **MR. LUTZ:** Yeah. I can just read to you what the --

21 **THE COURT:** I see.

22 **MR. LUTZ:** -- the relevant footnote says.

23 It says (reading):

24 "Data are projections based on currently
25 available data and estimates."

1 Okay? There could not be clearer forward-looking
2 statement language than that. What these are, are projections
3 based on the Four Box Model estimates. As we discussed in
4 detail in our first motion to dismiss briefing, this is
5 straight forward-looking statements protected under the safe
6 harbor.

7 **THE COURT:** All right. Thank you.

8 I would be curious still to know what was said about it,
9 which I take it you both have.

10 **MR. LUTZ:** Yeah. Of course we have it.

11 I would note, if it's -- you know, the plaintiffs need to
12 make these allegations and they need to submit the information
13 so that we can all look at that.

14 I can look and maybe my colleague -- Ms. Percopo might be
15 looking at the same exhibits as me -- can look to see whether
16 the actual transcript is attached as an exhibit to her prior
17 declaration as well. And maybe during the course of the
18 argument, we can find that.

19 **THE COURT:** All right. Another thing that I was struck
20 by -- and it's been alluded to, I think, by Mr. Rizio-Hamilton
21 in his last remarks -- is the statement about channel inventory
22 management, which is a neutral way to say what plaintiffs have
23 been alleging is channel stuffing.

24 ". . . we don't have much visibility into the
25 downstream channel ecosystem and we were maintaining

1 CI levels below our Tier 1 ceiling, we did not see
2 clearly enough that we had an issue."

3 ". . . we continued to maintain the levels of
4 channel inventory under our Tier 1 ceiling and
5 monitor Tier 2 inventory, where we had some
6 visibility."

7 I guess I'll ask you, Mr. Lutz. What is your view of this
8 statement?

9 **MR. LUTZ:** You're referring to Mr. Weisler's statement on
10 the February 2019 earnings call?

11 **THE COURT:** I believe so, yeah.

12 **MR. LUTZ:** Yeah. So this is -- this is what -- let me
13 take a step back.

14 Channel inventory is one of the categories of alleged
15 misstatements.

16 **THE COURT:** Right.

17 **MR. LUTZ:** Channel inventory -- plaintiffs allege in the
18 complaint, essentially, that a number of statements that
19 defendants made during the class period reporting that HP was
20 selling its products under a lower inventory ceiling -- those
21 are the channel inventory statements.

22 Remember, channel inventory was one of the changes that HP
23 implemented as part of the shift from the Push to the
24 Pull Model. This is back in 2016 when we made -- HP made the
25 business model shift.

1 When the company announced that shift -- this is before
2 the class period. When the company announced that shift in
3 June of 2016, HP said that it would be lowering inventory
4 levels as part of the shift to more of a demand-driven model.

5 So instead of pushing inventory into the sales channel
6 through high inventory ceilings and steep discounts, under the
7 Pull Model HP would reduce discounts and lower the inventory
8 ceilings, meaning lessen the amount of inventory that it would
9 put in -- that it would sell to its distributors each quarter.

10 And that's exactly what HP did, according to the
11 complaint, and we'll get to it. Throughout the class period,
12 HP reported each quarter that it had set lower inventory
13 ceilings, meaning lower limits on the number of supplies
14 products that it would sell to its distributors, and HP
15 reported each quarter that it was selling within those lower
16 inventory ceilings.

17 Plaintiffs do not allege that that was a false statement.
18 Okay? There is not a single allegation that HP did not lower
19 its inventory ceilings during this whole period, and plaintiffs
20 don't allege that HP failed to sell within those lower
21 inventory ceilings. So these statements about lowering the
22 inventory ceiling and selling within the lower ceilings are not
23 alleged to be false at all.

24 So plaintiffs' theory is that they were misleading. Okay?
25 Plaintiffs' theory is that every time that HP talked about

1 inventory ceilings, they should have explained that they were
2 referring to inventory that HP itself sold to distributors.
3 And these are the Tier 1 distributors, HP's actual, you know,
4 contractual partners who buy the products from HP.

5 Plaintiffs' theory, beyond that, is that HP should have
6 also explained that it didn't have precise data for inventory
7 that these Tier 1 distributors in turn sold to other levels in
8 the distribution chain: Tier 2, Tier 3, and so on.

9 But here's the point, Your Honor. Remember, when HP
10 announced the shift from the Push to the Pull Model in June of
11 2016, the company told investors that it can only really
12 understand what was happening with Tier 1, meaning the tier
13 that we actually sell to, and that its data on Tier 2 was
14 spotty. That's because, again, we had data on the level, the
15 distributors that we sold to. We didn't sell to Tier 2
16 distributors.

17 Plaintiffs' theory on the channel inventory also relies on
18 a false premise. Okay? They say throughout their complaint,
19 whenever they're talking about channel inventory, that the
20 channel inventory statements were misleading because HP didn't
21 disclose that it hadn't transitioned to a Pull Model. Right?
22 Their whole theory is we never transitioned to a Pull Model.
23 We continued to have steep discounts. We continued to have
24 gray marketing activity.

25 So their theory is every time we talked about channel

1 inventory, those statements were misleading because we
2 didn't -- because, at the same time, we were still engaged in
3 these unsustainable business practices, their quote.

4 That theory of fraud, as we can talk about in detail today
5 and as we went over in our briefing, does not have factual
6 support. There is no allegations, factual specific allegations
7 in the complaint that we didn't actually switch to a
8 Pull Model. Right? We did. There's no allegations that we
9 didn't.

10 We can go through the confidential witnesses who say that
11 there were some level of discounting, almost all of whom don't
12 say when the discounting occurred or that it was at the same
13 level as had occurred under the earlier model. Indeed, the
14 only confidential witness who talks about the actual level of
15 discounting says it was something less than 2 percent as
16 compared to the earlier model where the SEC settlement contains
17 an allegation of 40 percent discounts. Okay?

18 So, again, I can go through in detail, but it's a false
19 premise to say that the channel inventory statements were
20 misleading because we didn't disclose all of these undisclosed
21 business practices.

22 And finally, on the channel inventory, you have to
23 remember, in the quote that you just read from Mr. Weisler,
24 there's no discussion in there about the problem. Right?

25 Let me put it a different way. Plaintiffs' theory is that

1 the problem here was that HP was aggressively discounting and
2 jamming product into the market. Right? That's their theory.
3 And that's why we had the problem.

4 What we disclosed is that we didn't have good visibility
5 because we had a flaw in the Four Box Model. We had a flaw in
6 the telemetry data that we didn't realize until February of
7 2019. And we disclosed it. We said we thought that our demand
8 was something higher than what it actually turned out to be,
9 and that's what we disclosed. And when we realized it, we
10 learned that we had too much inventory in the market.

11 We didn't say: Oh, we've been aggressively discounting
12 and putting product into the market. We didn't say that we
13 were putting product -- selling product above our lowered
14 channel inventory ceilings. In fact, we said we're still
15 selling within our inventory ceilings. We just didn't know
16 that the demand was not as high as we thought it was.

17 So the other thing I'll note too is, you talk about
18 this -- and plaintiffs spent a lot of time in their complaint
19 on this February earnings call; and in their pleading, they
20 actually quote a bunch of analyst reports. I think it's very
21 telling that not a single one of the analysts said that there
22 was -- that they were surprise by the channel inventory or they
23 were surprised by the fact that we didn't have good visibility
24 below; they were surprised that our channel inventory ceilings
25 only included Tier 1 and we didn't have solid visibility below

1 that. Not a single one said that. Nobody said that. Right?

2 What they focused on was gaps in the Four Box Model and
3 our misestimation of demand as a result of it. Right? That
4 was the problem. The problem is, we realized we had a problem
5 and a gap in the Four Box Model and that, as a result, our
6 inventory ceilings were probably too high because we didn't
7 realize that the demand wasn't there.

8 The problem was not that nobody knew that channel
9 inventory ceilings only included Tier 1. That was not the
10 problem. The problem was not that we had been aggressively
11 discounting and putting in product into the market at levels
12 above our channel inventory ceilings. That's what plaintiffs
13 want the problem to be. There are no facts to support that.
14 No analyst said that. No analyst focused on that because that
15 was not the issue.

16 Just on scienter, I mean, if we're on the channel
17 inventory statements, I think the scienter point is persuasive.
18 They don't come close to pleading scienter as to the channel
19 inventory statements.

20 Their only argument in the briefing is on page 27, and
21 they say that the statements -- defendants made statements
22 about the inventory levels during the class period; so they
23 must have, quote, closely monitored channel inventory levels,
24 unquote. That's at page 27.

25 That allegation obviously is conclusory. Right? There's

1 no facts to support it. But even beyond that, it doesn't say
2 anything to suggest scienter. Plaintiffs don't even say what
3 defendants knew as a result of their supposedly close
4 monitoring of the inventory levels.

5 To plead scienter under this theory -- if you even credit
6 the theory -- but to plead scienter, they'd need to plead
7 specific facts showing that the individual defendants who made
8 the channel inventory statements knew that there were problems
9 below Tier 1 and that they, therefore, knew that it was
10 misleading to discuss channel inventory without referring to
11 tiers below Tier 1.

12 There aren't any facts to support that. That is simply
13 not pled in the complaint. There's no facts indicating that
14 before February any individual defendant believed or learned
15 that inventory was building up in any lower tier than Tier 1.
16 No facts at all.

17 There aren't any facts, any reports or other information
18 alleged in the complaint showing inflated levels of inventory,
19 let alone that any such report was provided to any of the
20 individual defendants.

21 Again, plaintiffs' theory is simply that the defendants
22 made statements about channel inventory so they must have known
23 that their statements were misleading.

24 That's not a way to plead scienter. That's not scienter
25 in the Ninth Circuit. If it were, there would be no

1 requirement under the PSLRA to plead specific facts giving rise
2 to a strong inference that an individual defendant knew that
3 his or her statements were false or had information available
4 to him or her demonstrating that the statements were false.
5 That is simply not alleged in the complaint for any of the
6 theories, for any of the misstatements but, in particular, for
7 the channel inventory statements.

8 I'll stop there and see if you have a question.

9 **THE COURT:** Okay. Thank you.

10 Mr. Rizio-Hamilton?

11 **MR. RIZIO-HAMILTON:** Thank you, Your Honor.

12 So the theory of this branch of the case is that prior to
13 the class period, the defendants knew that the company had been
14 repeatedly, habitually pumping excess inventory into the
15 channel in order to meet the sales targets.

16 There can't really be any dispute that the defendants were
17 aware that the company was doing that coming into the class
18 period. The SEC cease and desist order says it. The SEC
19 testimony that we obtained confirms it. Then they had to take
20 a \$450 million inventory write-down as a direct result of that
21 practice, which materially harmed the company.

22 Coming into our class period --

23 **THE COURT:** And there's a lawsuit about that. Is that
24 correct?

25 **MR. RIZIO-HAMILTON:** For a prior time period, yes.

1 **THE COURT:** Yes.

2 **MR. RIZIO-HAMILTON:** Yes.

3 Coming into our class period, they made a number of
4 statements designed to assure the market that they had
5 stabilized the business and changed the sales model in a way
6 that this would not recur. They said that they moved from a
7 Push Model to a Pull Model that was based on true demand
8 repeatedly.

9 We allege detailed facts showing that that was not true
10 because the pushing of excess inventory into the sales channel
11 continued to a material degree. That's kind of category of
12 statement one.

13 Category of statement two is that they misrepresented the
14 reason for the model change. So they told the market very
15 vaguely at the time that they announced this model change that
16 it was really just due to the impact of what they call the
17 omni-channel environment, and they repeated that explanation
18 during the class period.

19 In fact, as the SEC cease and desist order and the SEC
20 testimony show, the real impetus behind the model change was
21 that the company had repeatedly and intentionally pumped excess
22 inventory into the sales channel in order to meet sales
23 targets. But they didn't tell investors that that was why they
24 had to change the model. And that's a very significant
25 misstatement because it's covering up the reason for this big

1 sea change in the business, and it shows they didn't want
2 investors to know what had actually been going on, and it also
3 shows that they wanted to continue it. That's why they didn't
4 tell the full truth about what had been the impetus for this
5 change.

6 Then, in addition to these categories of misstatements,
7 they went out and told the market that: We've lowered our
8 inventory ranges, and we're now staying within the newly
9 lowered ranges and the newly lowered ceilings.

10 This was highly misleading because what they didn't tell
11 investors was that these so-called lower ranges and ceilings to
12 which they were referring only included a part of the channel,
13 and one part of the channel that was often smaller than the
14 rest of the channel, such that when they told investors "Our
15 inventory levels are healthy and within our ranges," that
16 statement was misleading because the ranges to which they were
17 referring, unbeknownst to the market, excluded huge portions of
18 the channel, if not the majority of it.

19 They said --

20 **THE COURT:** And what would that be, the huge channel that
21 it doesn't include?

22 **MR. RIZIO-HAMILTON:** That would be Tier 2 and lower.

23 **THE COURT:** And who runs Tier 2?

24 **MR. RIZIO-HAMILTON:** So there's wholesalers that they sell
25 to, and then there's -- in Tier 1; and those wholesalers sell

1 through to smaller-level salers in Tier 2; and the
2 smaller-level salers sell through to smaller --

3 **THE COURT:** So the wholesalers are in charge of Tier 2?

4 **MR. RIZIO-HAMILTON:** Tier 1. Tier 1.

5 So the wholesalers -- they're saying, you know: This is
6 what we are pushing -- you know, we're within our range, our
7 ceiling, and our channel levels -- inventory levels are
8 healthy.

9 What they're not saying is that statement refers only --
10 those levels --

11 **THE COURT:** What we are doing, and not do what somebody
12 else is doing.

13 **MR. RIZIO-HAMILTON:** Well, they often offered discounts to
14 Tier 2 to take more inventory as well. And they would give
15 discounts to Tier 1 so that they could give discounts to
16 Tier 2. And they would push inventory down in the channel
17 beyond Tier 1 so that they could clear room in Tier 1 to sell
18 additional excess inventory into the channel and still be
19 within this, quote/unquote, range that they were giving the
20 market, without telling the market that the ceiling and the
21 range only encompassed a portion of the channel and a portion
22 that was often smaller than the remainder.

23 **THE COURT:** And the proof you have of what you just said
24 is what now?

25 **MR. RIZIO-HAMILTON:** So we have -- we know they did this

1 before the class period. That, the SEC determined.

2 And we have multiple former employees whose reports are
3 new and are set forth in the complaint -- for instance,
4 Former Employees 2, 3, 4, and 8, among others -- who reported
5 that following the company's purported switch to this
6 demand-driven model, things didn't change.

7 Former Employee 2, for example, stated that the company
8 used these so-called acceleration asks and incentive dollars to
9 incentivize channel partners to take up to four times the level
10 of inventory that their demand actually warranted. In fact,
11 said Former Employee 2, this was done with major partners like
12 Office Depot and Staples, and to such a degree with Staples
13 that HP actually rented warehouses and trailers to house excess
14 inventory for Staples that Staples had taken on above its
15 demand.

16 Former Employee 3, for example --

17 **THE COURT:** When did that happen, that warehouse being
18 rented?

19 **MR. RIZIO-HAMILTON:** So Former Employee 2 spoke about a
20 time period that extended through the summer of 2019, so
21 several months into the class period. Former Employee 2
22 said -- Former Employee 2 had been at HP for many years, and
23 Former Employee 2 reported that nothing changed after the
24 announcement that they were moving to the Pull Model, and it
25 continued through former employee's tenure into July of 2019.

1 And our class period begins in February; so these activities
2 were going on during our class period.

3 Former Employee 3 similarly reported -- and Former
4 Employee 3's tenure in the relevant position ran through the
5 summer of 2017 -- pardon me -- 2017, several months into our
6 class period. And the same with Former Employee 2, 2017, July,
7 several months into our class period.

8 Former Employee 3 reported that the process of getting
9 channel partners to take excess inventory was so
10 institutionalized at HP that they had a five-page agreement
11 called "The Quarterly Incentives" that they would put out to
12 all the salespeople. They would put it out on the first day of
13 the third month of the quarter, so one month before the quarter
14 was going to close; and it would set forth the discounts that
15 the company was offering to get channel partners to take more
16 inventory than they actually wanted. And it provided that the
17 inventory had to be purchased by the 20th of that third month
18 of the quarter and it had to be taken by the end of that
19 third month of the quarter.

20 And, you know, I understand that Former Employee 2 gave
21 one example of a Tier 2-level discount that the company offered
22 between 2 and 5 percent. But Former Employee 3 said that even
23 at that level, it would amount to billions of dollars in
24 discounts because of the size of the company's business. And
25 Former Employee 3 did not report that the Tier 1 discounts were

1 limited to that level. So --

2 **THE COURT:** Former Employee 3, when did he say all this
3 stuff was happening?

4 **MR. RIZIO-HAMILTON:** Former Employee 3 was talking about
5 the time period between when the company said it was switching
6 and the summer of 2019 -- 2017. So that period includes
7 several months within our class period, which begins in
8 February of 2017.

9 And Former Employees 4 and 8 further corroborated that
10 these kinds of practices occurred in different regions
11 throughout the world; in the U.K. in the case of Former
12 Employee 4 and in South America in the case of
13 Former Employee 8.

14 And they also reported that these practices occurred
15 deeper into our class period. Former Employee 8, for instance,
16 reported that they occurred up through the end of his tenure in
17 the first quarter of 2018.

18 And beyond this, beyond these reports of the former
19 employees, other facts demonstrate that this did, in fact,
20 occur; namely, the company's admission in February of 2017 that
21 it had oversold the channel by what it estimated at the time
22 was \$100 million. Turned out to be a lot more. And the
23 company said at that time that the selling of excess inventory
24 into the channel had occurred in multiple prior quarters.

25 So we know from Former Employees 2 and 3 that this was

1 occurring between February and the summer of 2017 and the
2 beginning of our class period. We know from Former Employees 4
3 and 8 that it continued in 2018. And we know from the
4 company's own admissions that it continued throughout 2018 up
5 until the time that they were forced to disclose the excess
6 inventory buildup in February of 2019.

7 And, you know, analysts took note of this. You know, I
8 respectfully disagree with my colleague. Analysts specifically
9 stated -- and we cite this at paragraph 244 of our complaint,
10 among other places -- that the company's growth, what appeared
11 to be growth in 2018 was "inventory fueled," in the words of
12 the analysts. It wasn't real. It was because the company had
13 oversold inventory in the channel when it was telling investors
14 in a variety of ways that it was no longer going to do that.
15 And it was doing it at a time when the company's senior
16 executives knew that the company had engaged in this before,
17 said that the company was no longer overselling inventory, and
18 said that they were personally monitoring the situation.

19 Now, as to the scienter theory, you know, it rests on a
20 lot more than my colleague said. First of all, we know from
21 the SEC's cease and desist order and the testimony that we
22 obtained that the company's most senior executives learned of
23 the excess inventory selling to meet revenue targets by no
24 later than the first quarter of 2016, which predates our class
25 period. So we know they came into the class period with

1 knowledge that this had been occurring.

2 This conduct continued during the class period, despite
3 the fact that they said it wasn't. That is compelling evidence
4 of scienter. We know that they knew about it before, and yet
5 it continued, despite their statements to the contrary.

6 Not only did it continue during the class period, it
7 continued while the SEC was investigating the company for it.

8 Not only did it continue while the SEC was investigating
9 the company for it, but they continued to make the same kinds
10 of statements the SEC found misleading in September of 2020.
11 For instance, the SEC found misleading the statement that the
12 company was operating within its channel inventory ranges
13 because, as we allege now, the company didn't disclose that
14 those channel inventory ranges were materially incomplete and
15 actually did not give investors any true sense of what the
16 channel inventory level and health was.

17 And, finally, it is very true that the defendants stated
18 that they closely monitored channel inventory levels, and we
19 respectfully submit that that is additional support for the
20 scienter inference here.

21 We know from the SEC testimony that Defendant Lesjak's
22 finance team was responsible for setting the inventory ranges.
23 Defendant Lesjak received channel inventory reports. And the
24 company generated a weekly channel inventory package.

25 Defendant Lores told investors coming into the class

1 period: It will be critical, as it is today, for me to hold
2 the sales teams acceptable to remain within the ranges going
3 forward.

4 And the company stated -- and this is at paragraph 111 of
5 our complaint -- going into the class period, pricing and
6 promotional decisions will be managed centrally at the global
7 and regional level.

8 So the fact that the company knew this was happening
9 before the class period; made a series of statements to
10 investors representing that it was no longer occurring when it,
11 in fact, continued; and continued to make statements of the
12 sort that the SEC found misleading during our class period, all
13 the while ensuring investors that they were closely monitoring
14 these issues, and all the while they concealed from the market
15 the reasons for this purportedly critical model change, which
16 allowed them to continue it.

17 All of that, taken together, absolutely supports an
18 inference of scienter, particularly when viewed within the
19 context of how critical this business was to the company. It
20 was essentially all the company's revenue and profit. The
21 notion that the defendants had no idea this was going on is not
22 plausible, and it certainly isn't the most plausible inference
23 based on the totality of these facts.

24 **MR. LUTZ:** Your Honor, may I respond to that?

25 **THE COURT:** You may.

1 **MR. LUTZ:** Thank you.

2 There was a lot there to go through. That was -- let me
3 address a number of the points that were raised.

4 My colleague started by saying that we made misstatements
5 when describing the impetus for the change from the Push to the
6 Pull Model. That was in June of 2016. This is an argument
7 that I scratch my head at every time I hear it. (A) it's
8 before the class period; but (b) if you look at the
9 transcripts, we say specifically in there that there was -- one
10 of the reasons for the change was that it was no longer -- that
11 we had too many discounts; that we didn't think that it was
12 efficient anymore because the discounts weren't paying off, and
13 we wanted to lower the amount of inventory in the market. And
14 so we were lowering our inventory and trying to obtain price
15 stability, eliminate gray marketing. Exactly their theory.

16 So that one just makes no sense to me. It's right on the
17 page. If you read page 2 of that transcript, it says it
18 explicitly why we were making the change.

19 Discounts. There's a lot about discounts. Their theory
20 in many ways is about aggressive discounting that they say
21 occurred before the class period and then continued to occur
22 during the class period here.

23 The fundamental point that they ignore, among others, is
24 what we said when we were making the shift from the Push to the
25 Pull. We did not say -- HP did not say: We are going to

1 eliminate discounts. They said: We are going to lower the
2 amount of discounting that we are going to do under the
3 Pull Model. It was explicit in that June transcript,
4 June 2016.

5 Mr. Lores -- I'm sorry. Mr. Weisler said it specifically,
6 and we've quoted them in our papers to you. He said: I
7 wouldn't say we're going to do no promotions. He said: We'll
8 have less promotions.

9 Ms. Lesjak said: In total, we will have lower discounts
10 under the new model.

11 HP specifically said they were going to continue to do
12 discounts, albeit at a lower level than had been the case under
13 the Push Model.

14 The notion that some confidential witnesses say that they
15 were aware of discounting, that they knew discounting was
16 happening, that they sometimes did discounts is unremarkable.
17 We said discounting would continue.

18 The other thing, you asked Mr. Rizio-Hamilton: When did
19 Confidential Witness 3 say that happened? When did
20 Confidential -- when did the Staples thing happened?

21 He didn't answer your question, and the reason he didn't
22 answer your question is because they don't allege that in the
23 complaint. The confidential witnesses do not provide specific
24 factual allegations demonstrating when the discounting that
25 they say occurred happened, whether it was in the prior period

1 or whether -- you know, when we -- when the SEC alleged that
2 there were higher levels of discounting, or during the class
3 period of this case when HP said discounting would continue,
4 just at a lower rate.

5 The other thing, you have to pay attention to what we say.
6 Like Ms. Lesjak: In total, across the supplies business,
7 discounts will be lower.

8 Just because some -- even if you ignore the fact that the
9 plaintiffs have not provided specific factual allegations
10 demonstrating that discounting happened during the class
11 period, even if you ignore that and you just assume it all
12 happened during the class period, which is not a reasonable
13 assumption, if you make that assumption, where is the
14 allegation that, overall, the level of discounting at HP during
15 the class period was at the same level as it was before? It
16 does not exist.

17 It doesn't matter that one or two or ten witnesses, which
18 they don't have, said: Yeah, I was aware of discounting. That
19 does not -- that is not a specific factual allegation
20 demonstrating that the same level of discounting or a higher
21 level of discounting occurred during the class period.

22 That's why when you read their brief, if you read it
23 closely -- and I've read it, obviously, about ten times in the
24 last week. How many times do they say a material amount of
25 discounting? They were pushing a material amount of inventory?

1 That's made-up words. Right? They don't have factual
2 allegations to support that. They can't tie that back to a
3 specific factual allegation. They can't allege that the same
4 level of discounting that occurred under the Push Model, before
5 the class period, occurred during the Pull Model. In other
6 words, they can't allege that when Ms. Lesjak and Mr. Weisler
7 said, "Yeah, we're going to still do discounting; it's just
8 going to be lower," that that was false. There's no factual
9 allegation to support that.

10 On the SEC issue -- and, again, this one, I scratch my
11 head over too. The SEC settlement was a \$6 million settlement
12 covering a time period that is irrelevant to this case,
13 happening in the 2015 and early 2016 time frame. The --
14 you know, obviously, it can't impact the statements in this
15 case because it impacted -- it didn't cover the time period of
16 this case. So there's no falsity allegation based on the SEC
17 settlement.

18 And as to scienter, Your Honor, if anything, this
19 settlement undercuts an inference of scienter here. The
20 settlement -- the SEC didn't allege in the settlement that
21 anyone acted with scienter. They didn't charge any individuals
22 at HP. They didn't even mention any of the individual
23 defendants in this case. And they -- the settlement says that
24 the discounting and gray marketing activity that occurred in
25 that earlier period happened without the knowledge of the

1 senior officers of HP. That does not support any inference of
2 scienter.

3 And my colleague says: Well, this investigation was
4 happening during the class period of this case.

5 And to me, I hear that and I say: Is it really a
6 reasonable inference that during an entire class period,
7 two years, while the company is under investigation by the SEC,
8 that they're going to lie quarter after quarter about the
9 business model of the supplies business; that they're going to
10 continue to engage in conduct that is under investigation; that
11 they're going to shove -- you know, do massive discounts in
12 gray marketing and just hope the SEC doesn't realize it? I
13 mean, it's preposterous. Right? It is not a reasonable
14 inference.

15 The strong inference goes the other way; that of course
16 the company is not going to do that. This is a sophisticated,
17 large company who understands what an SEC investigation is.

18 Your Honor, the other thing, I just have to say, the
19 premise of the complaint -- right? -- is that all this stuff
20 was still going on, even though there's no real factual
21 allegations to support that: gray marketing, steep
22 discounting. And their theory in large part is: Well, the
23 defendants knew about it and they covered it up. They had to
24 have known about it.

25 I would direct your attention to paragraph 453, which when

1 I read the complaint, over and over I kept on coming back to
2 it. This is their theory, and it's summed up in one sentence
3 that has no factual support. They go through the whole thing.
4 It's just terrible things here.

5 "Defendants also knew or recklessly disregarded
6 the fact that HP continued to engage in these sales
7 practices after June 2016 and during the class
8 period."

9 I mean, come on. You have to have detailed factual
10 support for that. You have to have confidential witnesses who
11 say: I talked to them. I told them this was bad, this was
12 happening, and they knew that their statements were false. I
13 provided reports to them about the Four Box Model, showing that
14 it was flawed, or the steep discounting or gray marketing,
15 something; and they knew that that was happening at a level
16 similar to what had happened in the prior period. And they
17 went out and knew that their statements -- they had to have
18 known their statements were false and they said it anyway.
19 Your Honor, that is completely lacking from the complaint.
20 Okay?

21 At the end of the day, with scienter you have to,
22 obviously, weigh all the inferences that the plaintiffs ask you
23 to take, and you have to weigh the competing inferences here.
24 I would say that the competing inferences are very powerful
25 here. I would say the most plausible inferences that you can

1 draw from the complaint is not an inference of scienter. It
2 doesn't make sense, as a matter of basic common sense to me,
3 that HP senior officers would announce with fanfare in June of
4 2016 a fundamentally new business strategy for the company;
5 that they would then report quarter after quarter, year
6 after year on the progress of the company under that strategy;
7 but that secretly for two straight years that they knew all
8 along that the company had never even adopted that strategy.
9 That just doesn't make sense to me.

10 The most plausible inference, I believe, fairly read from
11 the allegations in the complaint is that the Pull Model
12 actually existed; that defendants believed that the Pull
13 strategy, the Pull Model was working, a belief that was
14 reinforced by two years of accurate predictions and increased
15 revenue from -- drawn from the Four Box Model; that defendants
16 reporting under the model of lower inventory ceilings, better
17 pricing, less gray marketing activity, and lower discounting
18 was accurate; and that the individual defendants were genuinely
19 surprised when in February of 2019 it turned out that the
20 Four Box Model had flawed data and was not reliable. That is a
21 very plausible, highly plausible, much more plausible inference
22 than the counter inference that the plaintiffs ask you to draw.

23 I'll stop there. I'd like to address loss causation, if
24 you want to hear about it; but I've been going on for such a
25 long time, I'll stop.

1 **THE COURT:** Okay. Thank you.

2 I wanted to ask you both. As far as I know, I don't have
3 a copy of the SEC order.

4 **MR. LUTZ:** Oh, it's in the submission. I have it here.

5 **MR. RIZIO-HAMILTON:** I believe it's Exhibit A, at
6 Document 89-1. So it's Exhibit A to the amended complaint.

7 **THE COURT:** Oh, okay.

8 **MR. RIZIO-HAMILTON:** It's on the docket at 89-1.

9 Your Honor, may I briefly respond?

10 **THE COURT:** Yes.

11 **MR. RIZIO-HAMILTON:** Thank you.

12 So my colleague mentioned that we were required to allege
13 that the discounting occurred to the same level as it had
14 before, prior to the purported switch to the Pull Model.

15 That's a red herring. We don't have to allege that it
16 existed to the exact same level. All we have to do is allege
17 that it continued to a material degree.

18 And that, we do, based not only on the reports of the
19 former employees in the complaint but, in particular, based
20 upon the company's own admission -- admissions, I should say,
21 beginning in February of 2019, that they had oversold the
22 channel again by what they estimated in February was
23 \$100 million, admitted in August was more than a hundred
24 million dollars, and then in November confirmed was more than a
25 hundred million dollars, without disclosing the full amount,

1 and confirmed that it was greater than they had initially
2 stated.

3 In addition, we see that the very large oversell of the
4 channel that occurred throughout our class period caused the
5 company to see a revenue decline of approximately
6 \$650 million year over year, the end of our class period, and
7 then ultimately abandoned the business model entirely.

8 So the key question is not whether it existed to the same
9 level that it did before. It's whether it continued to a
10 material degree. And for all those reasons, we adequately
11 allege that it did.

12 Second, my colleague mentioned that the SEC settlement
13 said that this happened without the knowledge of the senior
14 officers of the company. What the SEC cease and desist order
15 says -- and Your Honor can obviously read it for yourself --
16 which is confirmed by the testimony that we obtained, is that
17 while prior to the first quarter of 2016, the company's senior
18 officers lacked knowledge of these practices, as of the first
19 quarter of 2016 and certainly no later than June of 2016, those
20 senior officers did know that this was occurring. So that's
21 point two. They came into the class period with that
22 knowledge.

23 Point three, my colleague mentioned that the existence of
24 the SEC settlement undercut scienter because it is necessarily
25 implausible to believe that one would go about and continue

1 practices while under investigation by the SEC.

2 I respectfully disagree. Why would they do that? They
3 would do that because they had no choice. The business was
4 dying. They had to push massive amounts of excess inventory
5 into the channel, just -- before the class period, just to make
6 it look like it was doing well.

7 After they took a \$450 million hit and cleared out the
8 channel, the only way for them to continue to show some level
9 of stability and growth that they had to, in the eyes of the
10 market, was to continue to sell excess into the channel. Maybe
11 they didn't do it to the exact same degree, but they kept it up
12 because they had no other choice. This was confirmed at the
13 end of the class period when they abandoned the business model
14 entirely.

15 You know, the only way that this company could purport to
16 show stability and growth to the market in 2017 and 2018 was to
17 oversell the channel and try and buy time. That's why they
18 kept doing it.

19 **THE COURT:** That's a pretty big leap.

20 **MR. RIZIO-HAMILTON:** I respectfully disagree. I think
21 it's supported by what the confidential witnesses say. It's
22 supported by what ultimately occurred.

23 In February of 2019, the company disclosed that they had,
24 again, done this to a very significant degree. And that was
25 why, as analysts concluded, the company purported, appeared to

1 stabilize in 2017 and grow in 2018, because that was inventory,
2 if you will.

3 That's the way this company made its numbers. That's the
4 way it had to make its numbers because the business is not a
5 great one, frankly. You know, when you sell printers at a loss
6 and try and make that loss up on supplies, you get cannibalized
7 by other companies that make the supplies only and do it for
8 less than you.

9 And in the face of that, the only way that the company
10 could report the earnings that the market wanted to see and
11 show stability and growth was to oversell the channel. They
12 did it before the class period, as admitted. They did it
13 during the class period, as they disclosed in February of 2019.
14 It might not have been at the exact same level as they did
15 before, but it was still to a material degree.

16 **MR. LUTZ:** Your Honor --

17 **THE COURT:** All right. Thank you.

18 **MR. LUTZ:** I'm sorry. Go ahead.

19 **THE COURT:** Well, I was going to say, if anybody wants to
20 wrap up shortly, he may do so.

21 And, Mr. Schatz, if you want to say something, you may do
22 so also.

23 **MR. SCHATZ:** Your Honor, I'll be very brief.

24 I'm reticent to say anything in light of Mr. Lutz's
25 persuasive comments, but I will point out that Ms. Lesjak is --

1 provides an even stronger argument for dismissal.

2 She stepped down as CFO in June 2018. That's nine months
3 before the announcement and 15 months before the end of the
4 class period.

5 As Your Honor's prior order pointed out, those forecasts
6 were correct; and even to this day, the plaintiffs have not
7 come up with any facts that support that, during that time
8 frame, that which she said was incorrect.

9 This is no different than the prototypical
10 fraud-by-hindsight case; that the company learned after her
11 departure that there were issues with respect to certain
12 matters. They said the market had changed. There was more of
13 an emphasis on buying online and more sales to sellers that
14 were undercutting sales. But that's -- so the company did
15 exactly what it should have done, which was to disclose it.
16 But there's nothing to suggest that during her class period,
17 her statements were incorrect.

18 And I just want to address one or two specific points.

19 The only former employee who even references Ms. Lesjak is
20 Former Employee Number 5, and they -- and the key paragraphs
21 there are 476 and 483. And they say that she received -- he
22 says or she says that she received a report with respect to the
23 Four Box Model.

24 Putting aside that there's no reference to what the
25 content was, Your Honor, I'd like you to read 483, because in

1 483 the plaintiffs state the basis for FE 5's comments, and
2 it's either his boss's boss or his boss's boss's boss told him.
3 Your Honor, we have read that paragraph multiple times. We
4 can't decide how many intervening bosses there are in between.

5 But then I want you to also read page 8 of their
6 opposition. And it says that Former Employee Number 5
7 recalled -- "recalled" -- that Ms. Lesjak got a report.
8 "Recalled" normally suggests some direct knowledge; not two,
9 three, four levels away. So I just want to put an end to any
10 reference with respect to that.

11 And, Your Honor, with respect to the SEC order, I know I
12 speak for all the defendants that it's exculpatory.
13 Mr. Rizio-Hamilton eschewed mentioning that the SEC found that
14 information had not percolated up to senior management. And as
15 Mr. Lutz eloquently pointed out, it would be implausible,
16 perhaps insane, for the senior management to countenance that
17 during the pendency of the investigation.

18 One last comment about the SEC testimony. These are
19 sophisticated lawyers. They know how to -- if they had wanted
20 to put in the transcript, you would have thought they might
21 have mentioned the time, the context, or even a page cite.
22 They chose not to. What they tried to do is just sort of let a
23 little bit of unpleasant air into the atmosphere. We think
24 it's not worth the page cites that they omit.

25 So, briefly, I think the entire case should be dismissed;

1 but Ms. Lesjak, who departed long before, should certainly be
2 dismissed.

3 **THE COURT:** All right. Thank you.

4 **MR. LUTZ:** May I just have one minute to conclude, if I
5 may?

6 **THE COURT:** Okay.

7 **MR. LUTZ:** Yeah. Just responding to Mr. Rizio-Hamilton's
8 last comment about "All they need to show is that, quote,
9 discounting continued to a material degree," I mean, that's a
10 made-up standard. They haven't even pled it. And it doesn't
11 make any sense in light of the fact of what we said as we were
12 going into the shift from the Push to the Pull, which is:
13 Discounting would continue, just at a lower rate than it had
14 before.

15 I won't go over loss causation because I know our time is
16 short. I'll rest on the papers.

17 I would just direct Your Honor to the recent *Uber* case.
18 There, like here, there were multiple statements. I think
19 60 there and there were 75 here.

20 The plaintiffs have the obligation, when they have a
21 corrective disclosure theory, which is indisputable here, to
22 actually plead facts demonstrating that the revelation of new
23 information corrected some prior misstatement.

24 They have an impossible task when they have 75 alleged
25 misstatements. Just like in *Uber*, they can't do it here. They

1 haven't even tried to do it.

2 And the reason they haven't tried to do it is because of
3 what was revealed in February, which was flaws in the
4 Four Box Model. They can't plead facts and they haven't
5 clearly pled facts at all in the complaint demonstrating how
6 that new information corrected any of the alleged misstatements
7 about the Pull Model and discounting and the like. It just --
8 it doesn't make sense from a commonsense perspective, and it
9 certainly doesn't -- they haven't pled it under a corrective
10 disclosure theory consistent with the case law of the
11 Ninth Circuit.

12 I'll pause there. But thank you, Your Honor, for taking
13 the time.

14 **THE COURT:** All right. Thank you.

15 Mr. Rizio-Hamilton?

16 **MR. RIZIO-HAMILTON:** Thank you so much, Your Honor.

17 And, by the way, thank you so much for all the time that
18 you've given us today and on the prior motion. I really
19 appreciate your consideration.

20 I would like to just touch briefly on loss causation
21 because it was just mentioned. We do actually plead proximate
22 causation at paragraphs 525 and 526 of the complaint.

23 But setting that aside, we also plead facts that reveal
24 facts on the corrective disclosure dates that are the relevant
25 truth for our purposes.

1 For the February disclosure, for instance, it's not only
2 the lack of statistically significant telemetry data for the
3 Four Box Model, but it's also the fact that they had oversold
4 the channel by what they then estimated was \$100 million and
5 that they lacked visibility into Tier 2 and beyond.

6 For August, for example, it's that they had actually
7 oversold the channel by more than \$100 million, but they
8 weren't saying how much more.

9 And so those are new facts revealed to the market that
10 represented materializations of the concealed risks and
11 contradicted the prior statements that they had made. And so
12 that would suffice to plead loss causation, even if we hadn't
13 pled proximate cause, which, as I mentioned, we do.

14 And the only thing I'll say about *Uber* very briefly is
15 that *Uber* has nothing to do with this case. *Uber* is not even a
16 10(d) case. It's a state law cause of action. It involved
17 privately traded securities, not publicly traded securities.
18 It didn't even involve stock prices declines. It just involved
19 a series of markdowns on these privately held securities that
20 were taken by banks, not a market.

21 And finally, the reason the loss causation theory failed
22 in *Uber* is because the plaintiff failed to adequately allege
23 that the disclosures actually precipitated the markdowns.

24 Here, by contrast, we connect the disclosures on the three
25 corrective disclosure dates with the stock price declines that

1 they directly triggered. That was completely absent in *Uber*,
2 and that's why the case failed on that ground and it has no
3 bearing here.

4 Again, thank you very much for your time and
5 consideration. It's greatly appreciated.

6 **THE COURT:** You're most welcome.

7 Thank you, all. This has been very helpful. And we will
8 get a response to you shortly.

9 So the matter will be submitted at this time. Thank you.

10 **MR. RIZIO-HAMILTON:** Thank you.

11 **MR. LUTZ:** Your Honor, may I ask one question, not about
12 this?

13 **THE COURT:** Sure.

14 **MR. LUTZ:** We have on the calendar right now, I believe, a
15 case management conference next Friday, I believe. And
16 I believe if that's going to stick, we're going to have to
17 submit a submission tomorrow.

18 **THE COURT:** Tomorrow.

19 Esther, can we kick that out a little bit?

20 **THE CLERK:** How far out would you like to kick it?

21 **THE COURT:** Well, I'd say maybe a month.

22 **THE CLERK:** October 29th?

23 **THE COURT:** Is that date convenient for folks?

24 **MR. LUTZ:** That's fine for me.

25 **MR. RIZIO-HAMILTON:** Just checking, Your Honor. I'm sure

1 it's fine.

2 Yes, that would be wonderful. Thank you.

3 **THE COURT:** Okay. Thank you.

4 We'll move that out to the 29th; so your statement won't
5 be due until the 22nd. I should definitely have you an order
6 by then. If for some reason I don't, contact Esther, and we'll
7 move this again. But I don't think we'll need to do that.

8 All right. Thank you, all.

9 **MR. LUTZ:** Thank you, Your Honor.

10 **MR. RIZIO-HAMILTON:** Thank you, Your Honor.

11 **MR. SCHATZ:** Thank you.

12 **THE CLERK:** That concludes our civil law and motion
13 calendar for today.

14 (Proceedings adjourned at 12:12 p.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Friday, September 17, 2021

Ana Dub

Ana Dub, CSR No. 7445, RDR, RMR, CRR, CCRR, CRG, CCG
Official United States Reporter